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No. 99-2072

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

HEALY TIBBITTS BUILDERS, INC.,

Petitioner,

—v.—

ROBERT CABRAL AND DIRECTOR,
OFFICE OF WORKERS' COMPENSATION PROGRAMS,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONER'S REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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Petitioner has asked this Court to determine whether the structure of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901 et seq. (the Act), permits appellate review by the Benefits Review Board (Board) in the absence of a "hearing record". Pet. at 2-11. This fundamental question of procedure arises because the Board has adopted a practice unsupported by statutory language where "decisions" issued by local district directors in contested claims are subjected to direct appellate review although no "hearing record" does or can exist. The adoption of this practice, often referred to as "direct appeals", has been criticized and terminated by the Seventh Circuit Court of Appeals in *Pearce v. Director, OWCP*, 647 F.2d 716 (7th Cir. 1981), but accepted by the Ninth Circuit Court of Appeals in the decision under review herein.

The Federal Respondent contends that this fundamental question of procedure either does not exist or need not be resolved by this Court. Notwithstanding this contention, however, the Federal Respondent's opposition highlights, both in what it includes and in what it glaringly omits, the reasons the petition for a writ of certiorari should be granted.

I. Statutory Language

In support of the petition for a writ of certiorari, Petitioner has directed this Court to the plain and unambiguous language utilized by Congress to frame the appellate review authority held by the Board:

> The Board shall be authorized to hear and determine appeals raising a substantial question of law or fact taken by any party in interest from *decisions* with respect to claims of employees under this Act and the extensions thereof. The Board's orders shall be based upon the *hearing record*. The findings of fact

> in the *decision* under review by the Board shall be conclusive if supported by substantial evidence in the *record* considered as a whole.

33 U.S.C. § 921(b)(3) (emphasis added).

Petitioner interprets the foregoing language as permitting Board review only when, inter alia, a "hearing record" exists, i.e., a "record developed at [a] hearing before [an] administrative law judge." 33 U.S.C. § 921(b)(3); 20 C.F.R. § 802.301(a) and (b). Petitioner's interpretation assumes that § 921(b)(3) means what it says because said provision is unmodified by subsequent or prior relevant statutory language.

Notwithstanding the obvious importance of § 921(b)(3) and its limiting language, the Federal Respondent never once addresses said language in a direct fashion within the scope of its opposition. Rather than confront the part of § 921(b)(3) which limits Board review to the "hearing record" or explain, if possible, why Congress did not mean what it said, the Federal Respondent embarks upon a circuitous analysis of a completely different statutory section (33 U.S.C. § 928) in its effort to rationalize the irrational. Response at 8-10. This failure to specifically address the language of § 921(b)(3) which requires the existence of a 'hearing record" before Board review is tantamount to an admission that the practice of "direct appeals" has no tangible statutory support.

II. Circuit Court Conflict

In an effort to minimize and/or eliminate the decisional conflict which exists between the Seventh Circuit Court of Appeals' decision in *Pearce, supra*, and the Ninth Circuit Court of Appeals' decision under review herein, the Federal Respondent argues that no conflict exists because (1) the *Pearce* decision is too old; (2) a

"square" conflict does not exist because the underlying facts in *Pearce* were different than those herein; and (3) the precedential value of the *Pearce* decision is minimized to the point of insignificance because it has never been cited by a subsequent Seventh Circuit panel. Response at 6-8. Each position is untenable.

A. Age

Petitioner is aware of no theory of law or of precedent interpretation which renders decisions of a particular age void by the mere passage of time. Likewise, Petitioner is aware of no theory of law or precedent interpretation which renders ineffectual a decisional conflict between circuit courts of appeal if one of the decisions is twenty (20) years old. Were this a valid position, 20 year old decisions would be useless after the mere passage of too much time—a result which is clearly inappropriate and unsound. Moreover, the simple passage of time has never been viewed by this Court as bestowing a heightened or decreased sense of importance; reference to this Court's rejection of the "true doubt rule" in cases arising under the Act after said rule had been applied for decades illustrates the concept that time alone is an insufficient basis to accept or reject a particular practice. *See Director, Office of Workers' Compensation Programs v. Greenwich Collieries*, 512 U.S. 267 (1994). Accordingly, the Federal Respondent's attempt to minimize the impact of *Pearce* by emphasizing its age is confounding.

B. Square Conflict

The Federal Respondent attempts to reduce, minimize, or perhaps eliminate the existence of a conflict between *Pearce*, *supra*, and the decision under review herein by arguing that no "square" conflict exists because the factual underpinnings of both cases are different. Response at 6. Petitioner concedes (and has never argued other-

wise) that the facts of both cases are not the same, however, respectfully notes that the pertinent legal issue under review in both—whether Board review can be performed in the absence of a "hearing record"—was the same. In short, the *Pearce* court held that a "hearing record" is a necessary predicate to Board review:

> [T]he Board should have refused to hear the appeal and should have remanded it to the Chief Administrative Law Judge for further appropriate action as allowed by 33 U.S.C. Section 921(b)(4) quoted above, because the Board only had authority to review a "hearing record" and there was no such record before it. In short, there was nothing for the Board to review, as it had no authority to consider or review the evidence that had been gathered by the deputy commissioner, or his order, nor to substitute its views for those required to have been, but were not, set forth in an opinion of an administrative law judge.

Pearce, supra at 724-25.

Conversely and as clearly set forth at Appendix B 14a, the Ninth Circuit Court of Appeals held otherwise and recognized that their decision is "at odds" with *Pearce*. The Ninth Circuit did not qualify the existence or quality of their conflict with the Seventh Circuit nor was such a qualification warranted given the divergent substance of the two decisions. The Federal Respondent's attempt to presume the existence of or insert qualifying language on behalf of the Ninth Circuit is misguided; the Ninth Circuit could have but did not temper their assessment of the decisional conflict therefore no such diminution is presently warranted.

C. Precedential Value

The Federal Respondent contends that *Pearce* is ineffective precedent to establish a conflict with the Ninth Circuit's opinion at issue herein because the Seventh Circuit has never "followed" *Pearce* on an internal basis. Response at 7. Stated differently, the Federal Respondent asks this Court to assume that *Pearce* is no longer good law in the Seventh Circuit because it has never been explicitly followed by said Circuit in subsequent cases.

This contention must be rejected as without merit because *Pearce* has never been reversed and/or modified by the Seventh Circuit. Moreover, the mere fact that it has not been followed in subsequent decisions is a grossly misleading statement if viewed in isolation, *i.e.*, if it is not first recognized that the specific issue in *Pearce* regarding "direct appeals" has not been addressed by the Seventh Circuit after *Pearce*. Because the Federal Respondent did not direct this Court to a subsequent Seventh Circuit decision that rejects *Pearce*, their assertion that *Pearce* lacks precedential value because never followed is hollow—*Pearce* represents the Seventh Circuit's opinion on the propriety of direct appeals.

III. Direct Appeals

In its effort to convince this Court that direct appeals from district director decisions to the Board are procedurally permissible under the Act, the Federal Respondent relies upon the language of 20 C.F.R. § 725.366(e) which authorizes direct appeals in claims arising under a different statute (the Black Lung Benefits Act (BLBA) 30 U.S.C. § 932(a)). Careful review of pertinent aspects of the BLBA as contrasted with the Act, however, serves to highlight critical differences in the two statutes which makes direct appeal appropriate in one and clearly inappropriate in the other.

The BLBA confers initial adjudicatory authority on district directors as set forth at 20 C.F.R. § 725.350 (a) and (b):

> Sec. 725.350 Who are the adjudication officers.
>
> (a) General. The persons authorized by the Secretary of Labor to accept evidence and decide claims on the basis of such evidence are called "adjudication officers." This section describes the status of black lung claims adjudication officers.
>
> (b) Deputy commissioner. The deputy commissioner is that official of the DCMWC or his designee who is authorized to perform functions with respect to the development, processing, and adjudication of claims in accordance with this part.

In recognition of this status and to facilitate the exercise of adjudicatory powers granted, BLBA district directors are given all necessary authority to properly perform their role:

> Sec. 725.351 Powers of adjudication officers.
>
> (a) Deputy commissioner. The deputy commissioner is authorized to: (1) Make determinations with respect to claims as is provided in this part; (2) conduct conferences and informal discovery proceedings as provided in this part; (3) compel the production of documents by the issuance of a subpoena, with the written approval of the Director; (4) prepare documents for the signature of parties; (5) issue appropriate orders as provided in this part; (6) do all other things necessary to enable him or her to discharge the duties of the office.

See also 20 C.F.R. § 725.404.

And, to properly complement their role and power as initial adjudicator, BLBA district directors are authorized to issue decisions. 20 C.F.R. § 725.418. Reduced to essentials, therefore, BLBA district directors are recognized as adjudicators and are empowered to "make determinations with respect to claims", conduct conferences and discovery, issue subpoenas, issue orders, and issue contempt of court certifications. 20 C.F.R. § 725.351. Most important, BLBA district directors are authorized to develop a record, which, if necessary, travels intact to the next adjudicatory level (administrative law judge or Board). 20 C.F.R. § 725.451.

In strict and absolute contrast, district directors under the Act (Longshore district directors) are not designated adjudication officers and were in fact stripped of all adjudicatory function by Congress in 1972; moreover, Longshore district directors possess none of the powers necessary to effectuate adjudication, possess no true decisional authority in the face of disagreement, and possess absolutely no record-building authority or power. *See* 33 U.S.C. § 919(d); H.R. Rep. No. 92-11441, 92d Cong., 2d Sess. (1972); *Director, Office of Workers' Compensation Programs v. Newport News Shipbuilding and Dry Dock Co.*, 514 U.S. 122 (1995); Pet. at 7-11. In point of fact, the administrative file created in front of a Longshore district director cannot be transferred "under any circumstances" when proceedings beyond the district director level occur. 20 C.F.R. § 702.318. As such, to whatever extent the "administrative file" can be construed as the "record", it cannot be transferred out of the Longshore district director's office for consideration by an administrative law judge or the Board. Any formal proceeding conducted under the Act after Longshore district director action cannot be predicated on the administrative file; it therefore follows that no "hearing record" exists under the Act after Longshore district

director action both because the district director has no authority to build a record and because the transfer of administrative materials for administrative law judge or Board use is prohibited.

Petitioner respectfully contends that the Federal Respondent's attempt to use the BLBA as support for the proposition that direct appeals under the Act are procedurally permissible via either 20 C.F.R. § 725.366(e) or 20 C.F.R. § 802.201(a)(1) highlights precisely why they are not. Direct appeals are possible under the BLBA because a hearing record exists and because that record can be and is transferred to the Board upon appeal. Conversely, direct appeals are impossible under the Act because no hearing record exists after Longshore district director action and because whatever documents are contained in the administrative file cannot be transferred to the Board. The Board can faithfully fulfill its limited mission to review the "hearing record" when direct appeals occur under the BLBA; the Board cannot fulfill this limited mission when direct appeals occur under the Act.

Lastly, the Federal Respondent's attempt to avoid this obvious logical pitfall by unilaterally redefining the critical term "hearing record" and by arguing that the "decision" referred to in 33 U.S.C. § 921(b)(3) need not necessarily be that of an administrative law judge is equally unimpressive. Congress did not leave the term "hearing record" undefined and therefore open to speculation as to its intended meaning. Rather, pertinent regulations specifically define said term as the compilation of evidence "developed at the hearing before the administrative law judge . . . ." 20 C.F.R. § 802.301(b). If that regulation is insufficiently clear, 20 C.F.R. § 702.318 also serves to assist in this endeavor by indicating that "the formal record of proceedings shall consist of the hearing record made before the administrative

law judge." Equally as important, however, when the foregoing is juxtaposed with the fact that Longshore district directors cannot create a record and with the fact that Longshore district director work-product is non-transferable to "further proceedings" under the Act, it becomes abundantly clear that the regulatory definition of "hearing record" is consistent with the overall structure of the Act.

As for the Federal Respondent's argument that use of the word "decision" could refer to the decision of a district director, i.e., it need not exclusively refer to an administrative law judge decision, Petitioner asserts that such an argument crumbles under the weight of clearly-expressed legislative intent. Response at 11n.5. First, Longshore district directors have no adjudicatory authority and therefore no true decisional authority. Second, Longshore district directors cannot create a record therefore Board review could, at best, be conducted on a bald decision—a clearly inappropriate course of action given that the Board's function is to review the record in concert with the decision to see if the former supports the latter. Third, pertinent regulations prohibit the transfer of Longshore district director work-product to the Board. 20 C.F.R. § 702.318. And fourth, construing the word "decision" in the first sentence of 33 U.S.C. § 921(b)(3) as unmodified by or completely independent from the second and third sentences wherein the term "hearing record" is repeatedly used is illogical and has the net effect of distorting legislative intent as expressed in successive sentences. The absolute shift in adjudicatory authority from district director to administrative law judge in 1972 strongly if not dispositively suggests that Congress did not intend for the word "decision" as used in § 921(b)(3) and as modified in successive sentences to mean anything less than a decision from an administrative law judge. Such a construction of the term "deci-

sion" comports *in toto* with all other changes to the Act made in 1972 and avoids the seemingly untenable position adopted by the Federal Respondent.

IV. CONCLUSION

For these reasons and for the reasons set forth in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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